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No. 92-652

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

DAVID E. PAPENDICK, PETITIONER

v.

LOUIS W. SULLIVAN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Secretary of Health and Human Services excluded petitioner, a physician, from receiving reimbursement under the Medicare program for a two-year period. The question presented is whether, in reviewing the Secretary's decision, the district court was required to consider claims that petitioner did not advance in administrative proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 969 F.2d 298. The opinion of the district court (Pet. App. 9a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1992. The petition for a writ of certiorari was filed on October 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 1156 of the Social Security Act requires physicians and other health care practitioners who provide services under the Medicare

program to assure that the services (1) are furnished economically and only when, and to the extent, medically necessary; (2) are of a quality that meets professionally recognized standards of health care; and (3) are supported by adequate evidence of medical necessity and quality. 42 U.S.C. 1320c-5(a); see also 42 C.F.R. 1004.10. To ensure that practitioners meet their obligations under Section 1156, the Secretary of Health and Human Services contracts with peer review organizations (PROs) to assess the medical necessity and quality of the Medicare services provided by practitioners in specific geographic areas. 42 U.S.C. 1320c-2, 1320c-3(a); see 42 C.F.R. 1004.30(b).[1]

If a PRO determines that a practitioner has violated his or her obligations under Section 1156, the PRO must then determine whether the violations involved either a "substantial" failure to comply with Section 1156 "in a substantial number of cases" or are "gross and flagrant" in nature. 42 C.F.R. 1004.40; see 42 U.S.C. 1320c-5(b)(1).[2] In either situation, the PRO must send written notice advising the practitioner of its determination, the basis for it, and the sanction that the PRO will recommend to the Office of the

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[1] A PRO is either "composed of a substantial number of the licensed doctors of medicine and osteopathy engaged in the practice of medicine or surgery in the area" or "has available to it * * * the services of a sufficient number of licensed doctors of medicine or osteopathy * * * in such area." 42 U.S.C. 1320c-1(1).

[2] The Secretary has defined a "[g]ross and flagrant violation" of Section 1156 to mean a violation that "presents an imminent danger to the health, safety or well-being of a Medicare beneficiary or places the beneficiary unnecessarily in high-risk situations." 42 C.F.R. 1004.1(b).

Inspector General (OIG) in the Department of Health and Human Services (HHS). 42 C.F.R. 1004.40(b), 1004.50. The written notice informs the practitioner that he or she may, within 30 days, submit additional information in writing and request a meeting with the PRO to discuss its initial determination. 42 C.F.R. 1004.50(a)(5). If, after considering any additional information, the PRO makes a final determination that a practitioner has committed substantial violations in a substantial number of cases or one or more gross and flagrant violations, the PRO submits a report of its final determination and a sanction recommendation to the OIG. 42 U.S.C. 1320c-5(b); 42 C.F.R. 1004.60(a), 1004.70. Sanctions may include monetary penalties and exclusion of the practitioner from receiving Medicare reimbursement for a specified period. 42 U.S.C. 1320c-5(b)(1) and (3); 42 C.F.R. 1004.1(b), 1004.20, 1004.70(c).[3]

The OIG determines whether the practitioner has violated Section 1156 and, if so, whether the practitioner has "demonstrated an unwillingness or lack of ability substantially to comply" with Section 1156. 42 U.S.C. 1320c-5(b)(1); 42 C.F.R. 1004.90(b). Before the OIG makes those determinations, the practitioner may submit "additional written material or documentary evidence." 42 C.F.R. 1004.60(b)(2). If the OIG agrees that a practitioner has violated his or her statutory obligations, it decides on an appropriate sanction, based upon, among other things, the PRO's

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[3] The PRO bases the recommended sanction on the type of violations, their severity, the deterrent effect of the sanction, and the availability of alternative health care services in the community. 42 C.F.R. 1004.80.

recommendation, the type and severity of the violation, and whether the practitioner is unable or unwilling to comply substantially with the obligations. 42 C.F.R. 1004.90(d). Any period of exclusion imposed as a sanction takes effect 15 days after the practioner receives the OIG's decision. 42 C.F.R. 1004.100(f)(1).

If the practitioner is dissatisfied with the OIG's determination and sanction, he or she may obtain an evidentiary hearing before an administrative law judge. 42 C.F.R. 1004.130(a)(1).[4] At the hearing, the practitioner may call witnesses, submit briefs and documentary evidence, and present oral argument. 42 C.F.R. 498.58-498.63. If the practitioner is dissatisfied with the ALJ's decision, he or she may request review by the Appeals Council. 42 C.F.R. 1004.130 (a)(1). Following an adverse decision by the Appeals Council, the practitioner may seek "judicial review of the Secretary's final decision * * * as is provided in section 405(g) of [title 42]." 42 U.S.C. 1320c-5(b)(4).[5]

b. Petitioner is a general practice physician in Algoma, Wisconsin. In May 1986, the Wisconsin Peer Review Organization (WIPRO) sent petitioner a letter stating its initial determination that in three cases petitioner had grossly and flagrantly violated

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[4] 42 C.F.R. 1004.130(a)(1) incorporates the hearing procedures set forth in 42 C.F.R. Pt. 498. At the time of the hearing in the present case, those procedures were set forth in 42 C.F.R. Pt. 405, Subpt. O (1986). See 52 Fed. Reg. 22,446 (1987).

[5] The preclusion in 42 U.S.C. 405(h) of other avenues of judicial review also applies to proceedings under 42 U.S.C. 1320c-5. 42 U.S.C. 1320a-7(f)(3).

his obligations under Section 1156.[6] The letter identified the three cases, each of which involved a different patient, and the records on which the initial determination was based. The letter also informed petitioner that WIPRO intended to recommend that he be excluded from the Medicare program for 12 years. Finally, the letter told petitioner that within 30 days he could submit additional information in writing or request a meeting with WIPRO, or both. Pet. App. 1a-2a, 11a, 13a-20a; see also *Papendick* v. *Bowen*, 658 F. Supp. 1425, 1426-1427 (W.D. Wis. 1987).

Petitioner declined to request a meeting with WIPRO. Instead, he sent WIPRO a letter disputing WIPRO's characterization of the medical care he provided in the three cases identified in the initial determination. Petitioner also submitted documents and tape recordings from prior proceedings before a PRO; none of that material, however, concerned the three patients at issue in this proceeding. Pet. App. 2a, 20a-21a; *Papendick*, 658 F. Supp. at 1427.

On August 26, 1986, WIPRO recommended to the OIG that petitioner be barred from the Medicare program for a twelve-year period. Petitioner sent a letter to the OIG, accompanied by documentary evidence, arguing that exclusion was not warranted. Based on those submissions, on December 23, 1986, the OIG found that petitioner had grossly and flagrantly violated his statutory obligations by providing care to two cardiac patients, identified as H.D. and L.M., that did not meet professionally recognized standards. The OIG also determined that,

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[6] WIPRO later decided not to pursue one of the cases identified in its initial determination.

as a sanction, petitioner should be barred from receiving Medicare reimbursement for a two-year period (rather than the twelve-year period recommended by WIPRO). Pet. App. 2a, 11a, 24a-25a; *Papendick*, 658 F. Supp. at 1427-1428.

Petitioner sought a hearing before an ALJ. In a Report of Prehearing Conference and Order, the ALJ advised the parties that if they had either procedural or constitutional objections, they could raise those issues "in their closing briefs, in order to preserve them for an appeal." Pet. App. 38a. After a four-day hearing, the ALJ upheld the OIG's determination that petitioner had violated Section 1156 and should be excluded from the Medicare program for two years. Pet. App. 11a-12a. The Appeals Council affirmed the ALJ's decision. *Id.* at 41a-42a.[7]

2. Petitioner then brought this action challenging his exclusion in the United States District Court for the Eastern District of Wisconsin. Petitioner claimed that the Secretary's decision was not supported by substantial evidence. C.A. App. 112-114. Petitioner also made several claims that he had not made in the administrative proceeding. Specifically, petitioner claimed, for the first time, that the Secretary's procedures violated due process because (1) the OIG improperly had the dual roles of "being a party to the administrative litigation and being

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[7] Four months prior to the Appeals Council's decision (at the conclusion of the two-year exclusion), petitioner was reinstated in the Medicare program, based on the OIG's determination that there was reasonable assurance that the problems that led to petitioner's exclusion would not recur. Pet. App. 43a-44a; 42 U.S.C. 1320c-5(b)(2).

engaged in the investigation"; (2) the OIG had "established a quota system for the production of penalties and exclusions to be obtained by the I.G.'s staff"; and (3) the Sec-retary's procedures did not permit discovery of evidence relevant to petitioner's conflict-of-interest and quota claims. C.A. App. 116, 119 (Counts III and IV of complaint); see Pet. App. 22a.

Petitioner later served requests on the Secretary seeking discovery bearing on his due process claims. Pet. App. 25a, 27a. On the Secretary's motion, the district court granted a protective order barring the discovery. *Id.* at 24a-30a. The court observed that under 42 U.S.C. 405(g)—which applies here by virtue of 42 U.S.C. 1320c-5(b)(4)—its jurisdiction was "limited to review * * * [of] the record of testimony, exhibits, and issues compiled in the administrative forum, along with the particular findings and conclusions regarding these submissions advanced by the Secretary—through the ALJ and Appeals Council—in support of his final administrative decision." Pet. App. 29a. The court rejected petitioner's argument that it would have been futile for him to raise his due process claims before the Secretary:

> (1) [A]ssuming [petitioner] is correct that the OIG would have objected to consideration of the [due process] issues raised in [petitioner's] discovery requests, the ALJ and Appeals Council would not have been precluded from ruling on their jurisdiction over such issues, or in the alternative allowing [petitioner] to compile a record; (2) [petitioner] never gave the ALJ and the Appeals Council the chance to consider the issues raised

> in his discovery requests to preserve those issues for review; (3) although [the Secretary's hearing procedures] do[] not provide for prehearing discovery, the hearing procedures do provide for production of witnesses and documents at the hearing itself, which [petitioner] availed himself of on other issues, but not those issues on which he now seeks discovery; and (4) [petitioner's] discovery requests seek more than to raise collateral or procedural issues, for they seek to compile extrarecord evidence concerning these issues.

Id. at 28a.

The court subsequently granted summary judgment for the Secretary. Pet. App. 9a-23a. The court first held that the Secretary's decision to exclude petitioner from the Medicare program was supported by substantial evidence. *Id.* at 13a-20a. With respect to patient H.D., the district court determined that the evidence was sufficient to support a finding that petitioner "failed to employ adequate diagnostic skills, thereby failing to recognize H.D.'s deteriorating condition, and * * * failed to obtain timely outside cardiac consultation." *Id.* at 14a. The court further determined that petitioner's care of H.D. deviated from professionally recognized standards of health care. *Id.* at 14a-15a. With regard to patient L.M., the district court similarly held that the evidence was sufficient to support a finding that petitioner "placed L.M. at substantial risk and in very real danger of imminent death," *id.* at 20a, by failing to seek a cardiac consultation when it became apparent that his course of treatment was ineffective and that L.M.'s

condition was deteriorating, *id.* at 15a-20a. In addition, the district court found substantial evidence to support the conclusion that petitioner "ha[d] been unwilling and unable to comply substantially with his Social Security Act obligations." *Id.* at 21a.

The district court declined to address petitioner's due process claims, observing that "[d]espite the ALJ's * * * admonition regarding preserving issues and documents for appeal, [petitioner] failed to follow these dictates." Pet. App. 22a. Relying on its earlier decision entering a protective order, the court concluded that "[a]n issue not raised in the administrative phase of this action cannot be before this Court." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-8a. It held, first, that "there is not only substantial, but abundant evidence in the record to support the ALJ's decision that [petitioner] grossly and flagrantly violated his section 1156 obligations." *Id.* at. 5a. The court similarly held that substantial evidence supported the ALJ's determination that petitioner was unwilling and unable to comply substantially with his obligations under Section 1156. Pet. App. 6a. The court further held that the district court did not abuse its discretion in granting the Secretary's motion for a protective order. *Id.* at 7a. The court of appeals explained that petitioner's discovery requests sought evidence outside the certified record, which, under 42 U.S.C. 405(g), the district court was expressly precluded from considering. Pet. App. 7a. Finally, the court of appeals upheld the district court's refusal to consider petitioner's due process arguments, stating: "Our rule is that these issues

must first be raised administratively." *Ibid.* (citing *Weyerhaeuser Co.* v. *Marshall*, 592 F.2d 373, 376 (7th Cir. 1979)). Thus, the court of appeals "decline[d] to consider issues not considered by the Appeals Council." Pet. App. 7a.

ARGUMENT

Petitioner does not challenge the court of appeals' holding that "abundant" evidence (Pet. App. 5a) supports the Secretary's determination that he grossly and flagrantly violated his obligations under Section 1156 and was unable and unwilling substantially to comply with those obligations. Instead, petitioner argues that the courts below erred in declining to consider his due process claims. Those courts correctly concluded, however, that petitioner was not entitled to judicial review of his due process claims because he failed to raise them before the Secretary. That conclusion, moreover, does not conflict with any decision of this Court or any court of appeals. Further review is therefore not warranted.

It is well established that "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). As this Court has explained, administrative exhaustion "is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record

which is adequate for judicial review." *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).

Under the provisions governing judicial review in this case, the exhaustion requirement is "more than simply a * * * judicially developed doctrine"; it is "a statutorily specified jurisdictional prerequisite." *Salfi*, 422 U.S. at 766; accord *Heckler* v. *Ringer*, 466 U.S. 602, 619 n.12 (1984); *Doyle* v. *Secretary of Health & Human Servs.*, 848 F.2d 296, 299 (1st Cir. 1988). Specifically, 42 U.S.C. 1320c-5(b)(4) limits judicial review to review of the "Secretary's final decision * * * as is provided in [42 U.S.C.] section 405(g)." This Court has stated, in turn, that the "final decision" requirement in Section 405(g) is "central to the requisite grant of subject-matter jurisdiction," *Salfi*, 422 U.S. at 764, and

> consists of two elements * * *. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary.

Bowen v. *City of New York*, 476 U.S. 467, 483 (1986) (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976)).

In accordance with the exhaustion requirement in Section 405(g), "all aspects" of a claim, including constitutional challenges, must "be channeled first into the administrative process which Congress has provided." *Ringer*, 466 U.S. at 614; see also *Salfi*, 422 U.S. at 762 (under 42 U.S.C. 405(h), constitutional claims must be "brought under jurisdictional grants contained in the [Social Security] Act, and thus in

conformity with the same standards which are applicable to nonconstitutional claims arising under the Act"). Except where the Secretary has waived the requirement of full exhaustion or where a court may properly impute a waiver of that requirement, see, *e.g.*, *City of New York*, 476 U.S. at 483-486, the failure to raise a claim during the administrative process precludes courts from subsequently considering that claim.

Here, the court of appeals correctly concluded (Pet. App. 7a) that this case "falls within the rule [requiring exhaustion], not the exception," *Doyle*, 848 F.2d at 300.[8] This is not a case in which the Secretary has waived the exhaustion requirement or in which a court could properly infer a waiver. Cf. *Salfi*, 422 U.S. at 767.

First, the ALJ specifically invited petitioner to identify any constitutional issues in order to "preserve" them in the case, but he declined to do so.

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[8] Cf. *Winter* v. *California Medical Review, Inc.*, 900 F.2d 1322, 1324-1326 (9th Cir. 1990) (dismissing, on exhaustion grounds, suit by excluded physician challenging PRO's authority to review quality of his surgery); *Avol* v. *Secretary of Health & Human Servs.*, 883 F.2d 659, 661 (9th Cir. 1989) (declining to review excluded physician's contention that PRO's contract did not entitle it to conduct quality reviews because that contention was "not raised before the SSA Appeals Council"); *Hussain* v. *Secretary of Health & Human Servs.*, 748 F. Supp. 277, 279 (D.N.J. 1990) (dismissing, on exhaustion grounds, suit by physician seeking to enjoin his exclusion from Medicare program); see also *Lavapies* v. *Bowen*, 883 F.2d 465, 467-468 (6th Cir. 1989) (addressing constitutional claims by excluded physician on merits, but affirming dismissal, on exhaustion grounds, of physician's other claims, including claim that PRO was under a "quota" system).

Pet. App. 38a. As the district court observed (*id.* at 28a), petitioner "never gave the ALJ and the Appeals Council the chance to consider those issues," or to "rul[e] on their jurisdiction over such issues." Petitioner thus effectively waived those issues.

Second, petitioner's due process claims are not "wholly collateral" to his substantive challenge to the Secretary's decision. See *Ringer*, 466 U.S. at 618 (internal quotation marks omitted). Like the plaintiffs in *Ringer*, although petitioner "assert[s] objections to the Secretary's 'procedure' for reaching [his] decision," at bottom his objections are "inextricably intertwined" with his claim that he should not have been excluded from the program. *Id.* at 614. That is clear from petitioner's complaint, which requested relief aimed solely at reversing the effects of his exclusion, rather than at revamping the Secretary's decision-making procedures.[9] Cf. *City of New York*, 476 U.S. at 483 (plaintiffs challenging Secretary's secret, internal policy "neither sought nor were awarded benefits"); *Cassim* v. *Bowen*, 824 F.2d 791, 795 (9th Cir. 1987) (physician's suit seeking pre-exclusion hearing was collateral to merits of exclusion).

Furthermore, it cannot be said in this case that "there [is] nothing to be gained from permitting the

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[9] In his complaint, petitioner asked for retroactive reinstatement and payment of his Medicare claims; a declaration that his exclusion was illegal; and an injunction prohibiting the OIG from reviewing his Medicare activities or excluding him "while the PRO's are under the direction of the OIG." C.A. App. 120.

compilation of a detailed factual record, or from agency expertise." *City of New York*, 476 U.S. at 485. Petitioner's primary due process claim is that the OIG used a "quota" system for imposing exclusions and other sanctions. Pet. i, 5, 6-7, 8, 11. Yet there is no evidence in the administrative record regarding this alleged quota system. And the only evidence in the court proceedings is a heavily excerpted performance appraisal that covered a different period from the period during which petitioner's case was before the OIG. See Pet. App. 45a-46a. Nonetheless, in this Court petitioner does not dispute the district court's determination that he could have obtained evidence bearing on his due process claims under the Secretary's hearing procedures. *Id.* at 28a. Moreover, petitioner also could have presented argument on those claims, as the ALJ made clear in stating that the parties could raise "procedural/constitutional issues" in their post-hearing briefs. *Id.* at 38a. In light of petitioner's failure to avail himself of these procedures, the courts below properly declined to decide his constitutional claims "devoid of [a] factual context." *W.E.B. DuBois Clubs of America* v. *Clark*, 389 U.S. 309, 312 (1967).[10]

Petitioner nonetheless contends (Pet. 6, 8-9) that the courts below were required to consider his claims under *Bowen* v. *Michigan Academy of Family*

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[10] It should be noted that petitioner's "quota" argument is, in any event, of no continuing importance. We are informed by HHS that the portion of the performance appraisal held invalid in *Melashenko* v. *Bowen*, No. CV-F-87-533 (E.D. Cal. June 19, 1990), has been significantly revised to conform to that decision.

Physicians, 476 U.S. 667 (1986). That contention, however, is based on petitioner's erroneous assertion that *Michigan Academy* created an exception to the exhaustion requirement for all "constitutional, due process, methodology/procedural type issues" related to the Secretary's administration of the Medicare program. Pet. 6. The decision cannot be read so broadly.

Michigan Academy concerned a challenge by physicians to a regulation promulgated by the Secretary governing the amount of benefits payable under Part B of the Medicare program. 476 U.S. at 668-669. The question was whether judicial review of Part B regulations was barred by either 42 U.S.C. 1395ff(b), which at the time authorized judicial review of benefit amount determinations only under Part A, or 42 U.S.C. 1395ii, which makes 42 U.S.C. 405(h) applicable to the Medicare program. *Michigan Academy*, 476 U.S. at 673. The Court held that neither provision barred judicial review. *Id.* at 674-681. In so holding, the Court emphasized the "strong presumption that Congress intended judicial review of administrative action." *Id.* at 670; see also *id.* at 681.

Michigan Academy is inapposite in the present case. None of the statutory provisions at issue in *Michigan Academy* is applicable here. Moreover, there is no dispute that petitioner was entitled to judicial review of the Secretary's final decision excluding him from the Medicare program. See 42 U.S.C. 1320c-5(b)(4). Rather, the question is whether, in reviewing the Secretary's decision, the courts were required to consider claims that petitioner did not raise during administrative proceedings and as to

which no administrative record had been compiled.[11] As explained above, under this Court's decisions construing Section 405(g)—the provision authorizing judicial review in this case—the courts were not required to consider the claims that petitioner failed to raise in administrative proceedings.[12]

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[11] The sixth sentence of 42 U.S.C. 405(g) provides for a remand to the Secretary if there is additional evidence relevant to the district court's review of the case, rather than for the district court to receive such evidence itself (as petitioner sought here through his discovery requests). Moreover, such a remand may be ordered only if the evidence is "new" and "material" and there is "good cause" for the failure to incorporate it in the record in the administrative proceedings. See *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2164-2165 (1991). In light of petitioner's failure to preserve the due process issues and to introduce evidence concerning them in the administrative proceedings, he plainly has not shown "good cause" for a remand to the Secretary to develop the sort of evidentiary record that would be necessary to enable a court to consider the due process issues.

[12] This case need not be held pending this Court's disposition of *Darby* v. *Kemp*, cert. granted, 113 S. Ct. 404 (1992) (No. 91-2045). *Darby* presents the question whether, under the circumstances of that case, exhaustion of administrative remedies was required in the absence of a statute expressly requiring exhaustion. The present case, in contrast, concerns the application of a statutory exhaustion requirement: namely, 42 U.S.C. 405(g), which is made applicable to judicial review of exclusion decisions by 42 U.S.C. 1320c-5(b)(4). See generally *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1086 (1992) (distinguishing exhaustion required as a matter of "sound judicial discretion" from exhaustion "specifically mandate[d]" by Congress).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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